INTERIOR BOARD OF INDIAN APPEALS

Sessions, Inc. v. Vyola Olinger Ortner, Joseph Patrick Patencio, and Larry Olinger

3 IBIA 145 (11/12/1974)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF

SESSIONS, INC.

(A CALIFORNIA CORPORATION)

v.

VYOLA OLINGER ORTNER (LESSOR)

LEASE NO. PSL-33

JOSEPH PATRICK PATENCIO (LESSOR)

LEASE NO. PSL-36

LARRY OLINGER (LESSOR)

LEASE NO. PSL-41

IBIA 74-44-A

IBIA 74-11-A

IBIA 74-10-A

Decided November 12,1974

Appeal from Administrative orders canceling long-term business leases.

Affirmed and Dismissed.

1. Indian Lands: Leases and Permits: Long-term Business: Cancellation

   A lease may be canceled by the Secretary, at the request of the lessor where lessee has failed to carry out specific provisions of the lease.

2. Indian Lands: Leases and Permits: Long-term Business: Rentals--Indian Lands: Leases and Permits: Long-term Business: Waiver--Indian Lands: Leases and Permits: Long-term Business--Waiver: Generally

   Acceptance of rentals by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of items in default in the absence of showing that lessor voluntarily or intentionally waived the requirements under the lease.

APPEARANCES: Dillon, Boyd, Dougherty and Perrier, a professional corporation, for appellants, Sessions Inc., a California corporation;

IBIA 74-44-A
IBIA 74-11-A
IBIA 74-10-A

William M. Wirtz, staff attorney, Sacramento Regional Solicitor's Office, for Vyola Olinger Ortner, Joseph Patrick Patencio, and Larry Olinger, appellees.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matters come before this Board on appeals timely filed and taken by Sessions, Inc., hereinafter referred to as appellant, from decisions of the Area Director, Sacramento Area Office, Bureau of Indian Affairs, canceling three of its long-term business leases. Three separate appeals are actually involved herein. However, in the furtherance of justice and in order to expedite disposition of the appeals and on the basis that the legal and factual issues are common to all, the appeals involved herein are joined and are hereinafter referred to as appeal.

The appeal involves the cancellation of three of seven leases, PSL-33, Contract No. 14-20-0550-803; PSL-36, Contract No. 14-20-0550-805; and PSL-41, Contract No. 14-20-0550-809, on trust allotted lands, acquired by the appellant's predecessor in interest, Rancho Trailer Park, Inc., on April 11, 1960, from the three separate Indian owners, Vyola Olinger Ortner, Joseph Patrick Patencio and Larry Olinger. The leases contain identical covenants and differ only as to the rent (each lessor was to receive a varying rent on a percentage basis), description of the

lands, parties, and the value of the improvements to be placed upon each individual parcel. All three of the leases involved herein became effective upon approval by the Secretary of the Interior on January 27, 1961.

The dispute centers on Articles 7, 8 and 11 of Lease No. PSL-33 and Articles 8 and 11 of Leases No. PSL-36 and PSL-41 which in their pertinent parts provide:

> 7. IMPROVEMENTS
>
> As a material part of the consideration for this lease the lessee covenants and agrees that within five (5) years after the date of approval of this lease, Lessee shall have completed construction of permanent improvements on the leased premises at a cost of and having a reasonable value of THREE HUNDRED THOUSAND DOLLARS ($300,000).
>
> Improved trailer spaces on the leased premises at the date of approval of this lease shall be considered as part of such required permanent improvements with a value of FIFTEEN HUNDRED DOLLARS ($1500) for each such improved trailer space.
>
> 8. GENERAL PLAN AND DESIGN
>
> Within two (2) years after the approval of this lease, the Lessee shall cause and be prepared and submitted to the Secretary for approval, a general plan and architect's design for the full improvement and complete development of the entire leased premises. The Secretary shall not unreasonably withhold approval and shall either approve or state his reasons for disapproval within thirty (30) days after said plans are presented to him by the Lessee.

11. COMPLETION OF DEVELOPMENT

It is understood and agreed that the Lessee will complete the full development and improvement of the leased premises in accordance with the general plan and architect's design, approved in accordance with Article 8, above, within five (5) years from the date of the approval of this lease. If full improvement and development as specified is not completed within that period of time, the Lessee covenants and agrees that, at the request of the Secretary, Lessee will enter into an amendment of this lease, deleting from the leased premises those portions thereof not fully improved and developed. In the event that a portion of the leased premises are so deleted, the aggregate minimum and percentage rentals under this lease and the leases of the six contiguous parcels set out in Article 1(b) hereof shall not be decreased, but such aggregate minimum and percentage rentals shall be reapportioned among the lessors on the basis of the comparative values of the lands remaining on this lease and the leases on the six contiguous parcels. For the purposes of this reapportionment, the value of the leased premises herein described shall be (FOUR HUNDRED AND FIFTY DOLLARS ($450) per front foot for South Palm Canyon Drive frontage, to a depth of two-hundred and fifty feet (250') and SEVENTY-FIVE HUNDRED DOLLARS ($7500) per acre for the remaining area - Lease No. PSL-33); (SEVENTY-FIVE HUNDRED DOLLARS ($7500) per acre - Lease No. PSL-36); (SIX THOUSAND DOLLARS ($6000) per acre - Lease No. PSL-41).

Lease No. PSL-33, between Vyola Olinger Ortner, Palm Springs Allottee No. 4 and Rancho Trailer Park, Incorporated (Sessions' predecessor in interest), covers a five-acre tract described as the N 1/2 NE 1/4 SE 1/4 SE 1/4 sec. 22, T. 4 S., R. 4 E., San Bernardino Base and Meridian, Riverside County, California. Lease No. PSL-36, between Joseph Patrick Patencio, Palm Springs Allottee No. 17 and Rancho Trailer Park, Incorporated (Sessions' predecessor in interest), covers a five-acre tract described as the S 1/2 SW 1/4 NE 1/4 SE 1/4 sec. 22, T. 4 S., R. 4 E., San Bernardino Base and Meridian, Riverside

County, California. Lease No. PSL-41, between Larry Norman Olinger, Palm Springs Allottee No. 71, and Rancho Trailer Park, Incorporated (Sessions' predecessor in interest), covers a 7.5-acre tract described as the N 1/2 NW 1/4 SE 1/4 SE 1/4, SE 1/4 NW 1/4 SE 1/4 SE 1/4 sec. 22, T. 4 S., R. 4 E., San Bernardino Base and Meridian, Riverside County, California.

In brief, the leases in question required the appellant to fully develop and improve within five years from January 27, 1961, the leased premises which were then used as a trailer park. To this end, the lease terms provided that appellant was to submit within two years from January 27, 1961, to the Bureau of Indian Affairs as representative of the Secretary of the Interior for approval, a general plan and architect's design for permanent improvements. The plan, if approved, required construction of the improvements to be completed by January 26, 1966.

The appellant on January 24, 1962, requested a one-year extension of time in which to submit the general plans for the full development of the leased premises. The request was denied by the Palm Springs Office of the Bureau of Indian Affairs. Again on December 22, 1962, the appellant requested a year's extension for the submission of the general plans. The Palm Springs office recommended approval of the extension through modification of the leases by supplemental

agreements. Notwithstanding negotiations regarding the foregoing request, no plans were submitted up and through February 11, 1966. Finally, on March 24, 1966, appellant submitted to the Bureau of Indian Affairs two proposed plans for development of the leased premises. The plans were unacceptable to the appellees and the Bureau of Indian Affairs since they did not meet the requirements of the leases for the full development of the leased premises. No plans appear to have been submitted thereafter by the appellant. After much fruitless negotiation among the parties concerning the obligations under the proposed plans and the leases the appellees separately requested the Bureau of Indian Affairs to proceed with cancellation of the leases.

[1] The record regarding each lease further indicates that the Bureau of Indian Affairs pursuant to 25 CFR 131.14 by letters dated September 24, 1973, December 12, 1972, and March 15, 1973, gave the appellant ten days in which to show cause why the subject leases should not be canceled for alleged defaults under Articles 7 - IMPROVEMENTS, 8 - GENERAL PLAN AND DESIGN, and 11 - COMPLETION OF DEVELOPMENT of Lease No. PSL-33; and Articles 8 - GENERAL PLAN AND DESIGN, and 11 COMPLETION OF DEVELOPMENT of Leases No. PSL-36 and 41.

In response to the show-cause letters as to why the leases in question should not be canceled, the appellant in essence alleged

that it had (1) completed construction of permanent improvements in the reasonable amounts indicated in the respective leases, (2) it had submitted alternative plans to those submitted on March 24, 1966, but that the Bureau of Indian Affairs failed to approve or disapprove the plans and that the appellees had rejected the plans without good cause, (3) the appellees had waived any rights to require submission of plans or the further development of the property by the acceptance of rent for the past seven years and (4) the appellant has been precluded from developing the property by the refusal of the appellees to cooperate in the development of the property and to join in the dedication of Belardo Road required by the city of Palm Springs as a condition to further development. The Bureau found the foregoing reasons or allegations inadequate and so advised the appellant.

Thereafter, under dates of January 22, 1974, March 26, 1973, and April 20, 1973, the appellant was advised of and given 60 days in which to cure the alleged defaults under Articles 7, 8 and 11 of Lease No. PSL-33 and Articles 8 and 11 of Leases No. PSL-36 and 41. Failure on the part of the appellant to cure the violations within the 60-day period caused the Bureau of Indian Affairs to order cancellation of the leases effective as of April 2, 1974, as to PSL-33, May 3, 1973, and June 28, 1973, as to PSL-36 and PSL-41.

The appellant from said cancellations filed timely appeals setting forth the following reasons or contentions why the leases in question should not be terminated or canceled:

AS TO PSL-33:

1. Sessions Inc., submitted plans and designs for the improvements of the leased premises that have neither been approved nor disapproved by the Secretary and his subordinates.

2. Sessions' obligation to redevelop the lease PSL-33 is excused by the refusal of one or more of the Indian lessors to approve plans and designs for the redevelopment of Rancho Trailer Park and grant the dedication of city streets required for the development.

3. The Secretary and the lessor by having accepted the rent held under lease No. PSL-33, have waived Sessions' obligation under the lease to complete the development of the leased premises.

4. It would be an unjust result to forfeit lease PSL-33.

AS TO LEASES PSL-36 AND 41:

1. Sessions, Inc., has complied with its development obligations under Articles 7 (sic), 8 and 11 of the lease.

2. Sessions, Inc., has submitted plans and designs for the mobile home spaces on PSL-36 and PSL-41 that have neither been approved nor disapproved by the Secretary and his subordinates.

3. Sessions' obligation to redevelop lease PSL-36 and PSL-41 is excused by the refusal of one or more of the lessors to approve plans and designs for the redevelopment of Rancho Trailer Park and grant the dedications of city streets required for the development.

4. The Secretary and the lessor, having accepted the rent called for under lease No. PSL-36 and PSL-41, have waived Sessions' obligation under the lease to complete the development of the leased premises.

5. It would be an unjust result to forfeit leases PSL-36 and PSL-41.

Considering the Bureau of Indian Affairs' reasons for canceling the leases and the appellant's contentions hereinabove set forth opposing the cancellations, it is quite apparent that nonperformance of Articles 7, 8 and 11 of PSL-33 and Articles 8 and 11 of PSL-36 and 41 is claimed by the appellees while appellant claims waiver of performance. In short, appellant contends it is not in default of its obligations under Articles 7, 8 and 11 of Lease PSL-33 and 8 and 11 of Leases PSL-36 and 41 because the Secretary and his subordinates did not take any action with respect to the alleged plans submitted by appellant to the Bureau of Indian Affairs and the appellees as required by Article 8 of the leases. The appellant, accordingly, attributes its noncompliance under Article 11 of the leases on the Secretary's failure to act on the alleged plans under Article 8 of the leases as submitted on March 24, 1966. The alleged plans, among other things, required that the appellees dedicate part of their land to the city of Palm Springs for widening and extending certain streets through the middle of the leased premises.

We find nothing in the leases requiring the dedication as a requirement of the development of the premises. Since the dedication would require a substantial amendment to the lease, it must

be concluded that the Bureau of Indian Affairs was not required to approve or disapprove the alleged plans since it was not one to commercially develop the property within the terms of the leases. Moreover, refusal by the appellees to dedicate their land could hardly be deemed arbitrary or unreasonable since the dedication would possibly destroy for all times the future use of the property for commercial purposes.

In the absence of an approved extension, although requests had been made, of the period for submission of the plan and architect's design under Articles 8 of the leases, the Board finds that appellant was in default thereof as of January 26, 1963.

Furthermore, the due date for the performance of the obligations under Articles 7 and 11 of PSL-33 and Article 11 of PSL-36 and 41 in accordance with the approved general plan and architect's design was January 26, 1966. In the absence of an approved extension, and the failure to complete the improvements by that date, the Board further finds appellant was in default as to those articles.

The appellant's argument or contention that the performance of the obligations imposed by Articles 7, 8 and 11 of PSL-33 and Articles

8 and 11 of PSL-36 and 41 was waived by the appellees' continued acceptance of the rentals without requiring performance of the obligations or instituting action to terminate the leases is unacceptable.

Appellant in support of the foregoing contention cites and relies heavily on the case of Kern Sunset Oil Company v. Good Roads Oil Company, 6 P. 2d 71, § 214 Cal. (1931) as being the law applicable in this case regarding waiver and forfeiture wherein the court on page 440 thereof stated:

> The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule, and is supported by ample authority.

While it is a generally stated rule that acceptance of rental by the lessor after the lessee's breach implies a waiver of that breach, this concept, involving the knowing relinquishment of a right, is a matter of intent which necessarily depends on the factual circumstances of each case. Jose v. Iglesias, 462 F.2d 214, 216 (9th Cir. 1972); In Re Wil-Low Cafeterias, Inc., 95 F.2d 306, 309 (2nd Cir. 1938), cert. denied Wil-Low Cafeterias, Inc. v. 650 Madison Avenue Corporation, 304 U.S. 567 (1938). Thus "acceptance of rent is evidence to be considered by the trier of fact

but it is not necessarily conclusive." Jose v. Iglesias, supra at 216; cf. Bledsoe v. United States 349 F.2d 605, 607 (10th Cir. 1965); Smith v. United States, 113 F.2d 191, 193 (10th Cir. 1940).

[2] In the appeal at bar, the record indicates negotiations among the parties continued for several years after the appellant defaulted in January 1966. The record further indicates during that time several options being considered were whether appellant would pay an increased rental, proceed with full development based on new, long term leases, or surrender the premises to the appellees. Under these circumstances it must be concluded that the appellees did not conduct themselves so as to permit the conclusion that they had waived appellant's defaults nor had they intentionally waived the defaults in question.

Under very similar and like circumstances as in the matter herein, in the case of Sessions, Inc. v. Morton, et al., 348 F. Supp. 694 (1972), affirmed in Sessions, Inc. v. Morton et al., 491 F.2d 854 (9th Cir. 1974), the court found that acceptance of rentals by the lessors did not effect or constitute waiver of defaults. The lease there under consideration (Lease No. PSL-37), like the three leases on appeal herein, was one of the original group of seven Indian leases on the Palm Springs Reservation.

In view of the reasons hereinabove stated, this Board finds no compelling reasons to disturb the Area Director's decisions of April 2, 1974, May 3, 1973, and June 28, 1973, canceling Leases PSL-33, PSL-36 and PSL-41, and his decisions should be affirmed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (211 DM 13.7, issued December 14, 1973) and 43 CFR 4.1(2), the decisions of the Area Director dated May 3, 1973, June 28, 1973, and April 2, 1974, canceling leases PSL-33, PSL-36 and PSL-41 be, and the same are hereby AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

Done at Arlington County, Virginia.

//original signed
Alexander H. Wilson
Administrative Judge

We concur:

//original signed
David J. McKee
Chief Administrative Judge

//original signed
Mitchell J. Sabagh
Administrative Judge